

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 22 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC MAIL ROOM
Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202)

FM Table of Assignments)

(Utica, Hazelhurst and)

Vicksburg, Mississippi))

MM Docket No. 93-158
RM-8239

To: Chief, Policy and Rules Division

OPPOSITION TO CONTINGENT MOTION FOR LEAVE

St. Pe' Broadcasting, Inc., Petitioner and former licensee of WJXN-FM, Utica, Mississippi, and Willis Broadcasting Corp., the new licensee of WJXN-FM ("WJXN-FM"), ¹/ herewith submit their Opposition to the Contingent Motion for Leave, filed in the above proceeding by Donald B. Brady on October 12, 1993. In support whereof the following is shown:

1. In his Contingent Motion for Leave Donald B. Brady ("Brady") argues that, although filed subsequent to the August 9, 1993 deadline established for the filing of comments in this proceeding, his letter Comments should, nevertheless, be accepted

1. As reported in Comments filed by Willis Broadcasting Corporation ("Willis") on August 9, 1993, Willis had an application (File No. BALH-930714GE) pending before the Commission, seeking its consent to the assignment of the license of WJXN-FM to Willis. The Commission approved that application on September 14, 1993 and the transaction was consummated effective October 1, 1993. Accordingly, Willis is the current licensee of WJXN-FM.

No. of Copies rec'd
List A B C D E

054

and considered in the above proceeding because: (1) the Notice of Proposed Rulemaking (DA 93-600) did not state when "expressions of interest" were required to be filed, (2) he transmitted a copy of his Comments to a facsimile machine located somewhere in the Commission's offices on August 9, 1993 and (3) that he attempted to file the original and duplicate copies of his comments with the Commission by "same day courier service" on August 9, 1993, although the courier "did not arrive at the Commission prior to the closing of the Commission's offices at 5:30." However, none of these arguments obviates the undisputed fact that Brady's Comments were not filed until August 10, 1993, and accordingly were untimely and should be rejected.

2. Brady contends that "it is reasonable to assume that any other expressions of interest in the channel would be in the nature of "replies" to the comments filed by Petitioner," and, thus, that his comments were not required to be filed until the August 24, 1993 reply comment deadline. Not only is this contention ludicrous on its face, it is clear that Brady was well aware of the need to submit his "expression of interest" in the form of comments and to file by the August 9, 1993 deadline. As an initial matter, Brady specifically refers to his filing as "comments." See: Attachment A to Brady's Motion. More significantly, his attempt to transmit his comments on August 9, 1993 by both facsimile and by same day courier service, clearly reflects his recognition of the need to comply with the August 9, 1993 deadline. Brady cannot seriously contend that he would have

expended \$ 77.81 to secure same day delivery of his comments, if he seriously believed that they could be filed as late as August 24, 1993, or, indeed, a single day beyond August 9, 1993. Accordingly, this argument is disingenuous on its face.

3. Brady's contends that the copy of his comments which he transmitted by facsimile transmission on August 9, 1993 served to meet the filing deadline. However, merely transmitting a document to a facsimile machine located somewhere in the Commission's offices does not constitute filing. The Commission's Rules do not permit filing by facsimile transmission. ²/ Indeed, Brady's own Motion demonstrates this fact, inasmuch as the document in question clearly bears the receipt stamp of the Secretary's office, dated August 10, 1993, reflecting that, although someone at the Commission directed Brady's facsimile to the Secretary's office (although Brady had no legitimate expectation that anyone would do so), it was not delivered to the Secretary's office and filed until August 10, 1993. Thus, the fact remains that Brady filed nothing by the close of the August 9, 1993 deadline.

4. Brady's reliance upon his attempt to have his comments delivered to the Commission on August 9, 1993, is equally unpersuasive. Other than reflecting his clear understanding of the need to have his comments on file by the August 9, 1993

2. While the Rules do permit the filing of documents containing facsimile signatures under certain circumstances, that is not what occurred here. Here, Brady sought to meet the filing requirement by facsimile transmission, which is not permitted.

deadline, his actions in this regard only serve to underscore a serious lack of diligence. In that regard, according to the Air Waybill (Attachment B to Brady's Motion), the original and duplicate copies of his comments were sent via Delta Dash on Flight 1094, connecting with Flight 228, on August 9, 1993. However, based upon information contained in the OAG Flight Guide (July, 1993, Ed.), Flight 1094 was scheduled to depart Jackson, Mississippi, at 1:50 PM CST, and arrive in Atlanta, Georgia at 3:59 PM EST and Flight 228 was scheduled to depart Atlanta, Georgia at 4:58 PM EST and arrive in Washington, D.C. at 6:40 PM EST. Thus, given the package's routing via these two flights (which must be assumed to reflect the most expeditious route), Brady should have known at the time he shipped the package that it could not possibly be delivered prior to close of the Commission's offices in Washington on August 9, 1993, inasmuch as Flight 228 was not due to arrive in Washington until 6:40 PM EST that evening, over an hour after the Commission's offices would have closed.

5. Brady has advanced no showing which would warrant nunc pro tunc acceptance. No showing, whatsoever, is advanced regarding any reason or justification for Brady's having waited until the due date to attempt to submit his comments. As indicated above, Brady clearly was aware of the August 9, 1993 deadline and the need to have his comments on file by that date. Yet, his efforts were too little and too late. The Commission's rules do not permit filing by facsimile transmission. While

Brady could have transmitted his comments by facsimile transmission to someone outside the Commission on August 9, 1993 and arranged to have them properly filed in the Secretary's office that day (there are numerous commercial establishments in Washington providing this type of service), he did not do so. Likewise, his attempt to file his his comments by same day courier did not reflect any "attempt to achieve substantial compliance," where the flight in question was not due to arrive until after the Commission's offices had closed. Instead, Brady's actions simply amount to an unexplained and unjustified lack of diligence, resulting in the untimely filing of his comments, which, accordingly, should be rejected.

6. Finally, Brady's untimely comments and Motion raise serious questions concerning his motivation. There exists no equivalent channel for assignment at Utica. Thus, if Brady's "expression of interest" could be considered, it would only serve to "block" the proposed upgrade of WJXN-FM and the related channel substitutions, all of which will provide improved service for their respective communities. Thus, he would gain nothing through the consideration of his "expression of interest," unless his interests would somehow be served by simply "blocking" the proposals advanced in this proceeding. As such Brady's comments and Motion can only be viewed as strike filings, designed to impede or delay the action requested by other parties to this proceeding, an entirely improper and illegal purpose. Thus, the Commission should commence an appropriate investigation to

determine whether Brady's filings have any legitimate purpose, as opposed to merely "blocking" the proposals advanced in this proceeding.

7. Therefore, for the reasons stated above and previously stated in reply comments, Brady's comments are untimely and should not be accepted. Furthermore, for the reasons stated in St. Pe's Reply Comments, filed August 24, 1993, Brady's "expression of interest" may not be considered in this case in any event.

Respectfully Submitted,

ST. PE' BROADCASTING, INC.

and

WILLIS BROADCASTING CORPORATION

By: 

Timothy K. Brady
Its Attorney

P.O. Box 986
Brentwood, TN 37027-0986
(615) 371-9367

October 22, 1993

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 21st day of October, 1993, served a copy of the foregoing Opposition to Motion for Leave by First Class mail, postage prepaid upon the following:

John M. Pelkey, Esq.
Haley, Bader & Potts
4350 North Fairfax Drive, Suite 900
Arlington, VA 22203-1633
(Counsel for Donald B. Brady)

James R. Cooke, Esq.
Harris, Beach & Wilcox
1816 Jefferson Place, NW
Washington, DC 20036
(Counsel for Crossroads Communications, Inc.)


TIMOTHY K. BRADY